UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOHN CRANN, et al.,

Plaintiffs,

v.

OFFICER L. CARVER, et al.,

Defendants.

NO. C05-1529P

ORDER ON DEFENDANT PRICE'S MOTION FOR ATTORNEYS' FEES, COSTS, STATUTORY DAMAGES, AND RULE 11 SANCTIONS

This matter comes before the Court on a motion by Defendant John Price titled: "(1) Motion for Award of Attorneys Fees, Costs and Statutory Damages; (2) Renewed Motion for Rule 11 Sanctions; and (3) Request for Entry of Final Judgment with Rule 54(b) Certification." (Dkt. No. 96). Through this motion, Mr. Price is seeking an award of statutory damages under RCW 4.24.510, as well as an award of attorneys' fees and costs under RCW 4.24.510 and 42 U.S.C. § 1988. Mr. Price also seeks Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond.

The Court has reviewed the papers and pleadings submitted by Defendant Price, Plaintiffs John Crann and Laurel Black, and Plaintiffs' former counsel Paul Richmond, as well as the balance of the record in this case. Being fully advised and having heard oral argument on this matter, the Court GRANTS in part and DENIES in part Defendant Price's motion. The Court ORDERS as follows:

(1) The Court GRANTS Defendant Price's request for an award of statutory damages of $10,000 pursuant to RCW 4.24.510. Plaintiffs' former counsel Paul Richmond will be liable for payment of this award.

(2) The Court GRANTS in part and DENIES in part Mr. Price's request for attorneys' fees and expenses under RCW 4.24.510. The Court awards Mr. Price fees of $3,910 and expenses of $72.22 pursuant to RCW 4.24.510. Plaintiffs' former counsel Paul Richmond will be liable for payment of these fees and expenses.

(3) The Court DENIES Mr. Price's request for attorneys' fees under 42 U.S.C. § 1988.

(4) The Court GRANTS in part and DENIES in part Mr. Price's request for Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. The Court grants this request to the extent that Mr. Price seeks a ruling that Mr. Richmond violated Rule 11 by bringing plainly unsustainable state-law claims against Mr. Price. However, the Court denies this request to the extent Mr. Price seeks monetary sanctions against Mr. Richmond under Rule 11. The Court finds that monetary sanctions under Rule 11 are not warranted to deter future conduct, given that the Court is requiring Mr. Richmond to pay approximately $14,000 in fees, expenses, and damages to Mr. Price under RCW 4.24.510.

(5) The Court DENIES as moot Mr. Price's request for entry of a partial final judgment under Rule 54(b). Because all claims against all Defendants have now been dismissed, the Court will enter a final judgment in this matter pursuant to Rule 58.

The reasons for the Court's order are set forth below.

Background

The Court previously described the background of this case in its order on Defendant Price's motion for summary judgment. See Dkt. No. 89. To summarize briefly, Plaintiffs John Crann and Laurel Black, through attorney Paul Richmond, filed this lawsuit in September 2005 against Mr. Price, the City of Seattle, the City's Office of Professional Accountability, and several Seattle police officers.

Mr. Crann was arrested by the Seattle police on October 5, 2003 after Mr. Price, a private citizen, reported to the police that he suspected Mr. Crann of car prowling. Plaintiffs' suit raised claims for deprivation of constitutional rights under 42 U.S.C. § 1983, along with various state-law claims.

On June 15, 2006, the Court granted Mr. Price's motion for summary judgment on all claims asserted against him. The Court found: (1) Mr. Price was not subject to suit under § 1983 because he was not a state actor; and (2) Mr. Price was immune from Plaintiffs' state-law claims under RCW 4.24.510, a Washington statute that immunizes individuals from civil liability based on their communications to a government agency regarding any matter reasonably of concern to the agency. RCW 4.24.510 provides that an individual prevailing on the defense provided by the statute is entitled to recover the reasonable attorneys' fees and expenses incurred in establishing the defense, as well as $10,000 in statutory damages. However, statutory damages may be denied if the court finds that the defendant's communication to the agency was made in bad faith.

The Court directed Mr. Price to file a motion documenting any attorneys' fees and expenses that he intended to claim under RCW 4.24.510. The Court also indicated that Mr. Price could seek statutory damages under RCW 4.24.510, but noted that Plaintiffs could oppose such an award on bad faith grounds. Finally, the Court reserved ruling on a motion for Rule 11 sanctions filed by Mr. Price, noting that the motion may be moot in light of Mr. Price's ability to seek attorneys' fees and expenses under RCW 4.24.510. Following the Court's ruling, Paul Richmond withdrew as Plaintiffs' attorney.

Mr. Price has now moved for attorneys' fees, expenses, and statutory damages under RCW 4.24.510, as well as attorneys' fees under 42 U.S.C. § 1988. In addition, Mr. Price has renewed his request for the imposition of Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. Plaintiffs have responded to Mr. Price's motion through new counsel. Mr. Richmond has responded to Mr. Price's motion in a separate brief.

Analysis

1. Statutory Damages Under RCW 4.24.510

The Court first considers whether Mr. Price is entitled to an award of statutory damages under RCW 4.24.510. The statute provides that "a person prevailing upon the defense provided for in this section . . . shall receive statutory damages of ten thousand dollars," with the proviso that "[s]tatutory damages may be denied if the court finds that the complaint or information was communicated in bad faith."

As Mr. Price notes, RCW 4.24.510 provides that a court "shall" award statutory damages to a party prevailing on the immunity defense, although a court "may" deny statutory damages based on a finding of bad faith. Under Washington law, it is well-established the use of the term "may" in a statute is regarded as permissive or discretionary, while the use of the term "shall" is regarded as mandatory. See, e.g., Erection Co. v. Dep't of Labor & Indus., 121 Wn.2d 513, 518 (1993) ("The word 'shall' in a statute . . . imposes a mandatory requirement unless a contrary legislative intent is apparent"); Strenge v. Clarke, 89 Wn.2d 23, 28 (1977) (noting that words in a statute must be given their ordinary meaning unless a contrary intent appears and that "[t]he ordinary meaning of the word 'may' conveys the idea of choice or discretion"). As a result, an award of statutory damages to a defendant prevailing on the defense provided by RCW 4.24.510 is mandatory unless the Court in its discretion declines to award such damages based on a finding of bad faith by the defendant.

Mr. Price maintains that under Washington law, bad faith must be established by "clear, cogent, and convincing" evidence. Radley v. Raymond, 34 Wn.2d 475, 482 (1949). Mr. Price also argues that this standard requires proof that the fact in question is "highly probable." Colonial Imports, Inc. v. Carlton Northwest, Inc., 121 Wn.2d 726, 735 (1993). Plaintiffs do not dispute these points. The parties also do not generally dispute that under Washington law, "[t]o prove bad faith, one must show 'actual or constructive fraud' or a 'neglect or refusal to fulfill some duty . . . not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister

motive.'" Ripley v. Grays Harbor County, 107 Wn. App. 575, 584 (2001) (internal quotation marks and citations omitted).

Plaintiffs offer several arguments in support of their position that Mr. Price's communications to the police were made in bad faith. Plaintiffs suggest that Mr. Price: (1) falsely told the police that several weeks before Mr. Crann's arrest on October 5, 2003, Mr. Price had called the police after confronting a knife-wielding car prowler in the same neighborhood; and (2) lied to the police when he told them that he had witnessed Mr. Crann attempting to open a car door in a suspicious manner on the night of October 5th. Mr. Crann also maintains that he had seen Mr. Price earlier on October 5th and that Mr. Price appeared to be intoxicated. Plaintiffs also argue that Mr. Price told an investigator after the incident that Mr. Crann's arrest had been "hilarious."

Mr. Price has previously offered two declarations attesting that the prior alleged incident occurred near the residence of one of his friends, in the same neighborhood where Mr. Crann was arrested on October 5, 2003. (Dkt. Nos. 57 at ¶ 4; Dkt. No. 70 at ¶ 4). It appears that this friend was Tony Sherbon, who has also offered an affidavit indicating that he witnessed the prior alleged event. (Dkt. No. 110-1). However, neither Plaintiffs nor Defendant have been able to locate any police records regarding the alleged prior incident. The police report from Mr. Crann's arrest indicated that Mr. Price told the police that this alleged incident had occurred "approximately six weeks ago."[1]

Under Fed. R. Evid. 803(10) and 902, Plaintiffs may attempt to prove that this event never occurred by offering certified evidence that a diligent search failed to disclose any police records or

[1] Plaintiffs assert that Mr. Price has been inconsistent as to whether the alleged prior incident took place two weeks or six to eight weeks before Mr. Crann's arrest. Plaintiffs argue that Mr. Price had previously stated that the prior incident took place "two weeks" before Mr. Crann's arrest, pointing to a memo written by an investigator working for Mr. Crann following an interview with Mr. Price in December 2003. Putting aside concerns about this memo's accuracy (for example, the memo refers to Mr. Price as Mr. "Pierce"), it should be noted that the same memo indicates that Mr. Price told the investigator that the prior incident had occurred "a few weeks before the incident that involved the arrest." (Dkt. No. 103-2 at 1).

reports from the prior alleged incident. However, it is not entirely clear that Plaintiffs' public disclosure requests were sufficiently broad to encompass any police records of the prior alleged incident, given that the police were allegedly called from one address but the search for the alleged suspect purportedly took place at a motel some blocks away. In any case, even assuming that the materials offered by Plaintiffs satisfy the "diligent search" and certification requirements of Rule 803(10) and Rule 902, such evidence is not conclusive and may be rebutted.

Here, Mr. Price has offered sworn statements from himself and his friend Tony Sherbon attesting that the prior alleged incident occurred and that the police were called. To be sure, as Plaintiffs note, Mr. Price and Mr. Sherbon's statements are not entirely consistent. For instance, Mr. Price has stated that he called the police to report the prior incident, while Mr. Sherbon states that he made the call. In addition, Mr. Price's declaration indicates that Mr. Sherbon's residence was in the 3900 block of Whitman Avenue North, while Mr. Sherbon indicates that he lived on the 3900 block of Woodland Avenue North.[2] Nonetheless, there is no apparent reason why Mr. Price would have lied to the police on the night of Mr. Crann's arrest when he told them that the prior alleged incident had occurred. There is no evidence that Mr. Price or Mr. Sherbon knew Mr. Crann or had any incentive to invent the alleged prior incident. In addition, there is no apparent reason why Mr. Price would have deliberately called the police on October 5, 2003 to make a false report regarding suspicions that Mr. Crann was car prowling in the neighborhood on that night.

In essence, Plaintiffs suggest that Mr. Price called the police on October 5th and invented the prior alleged incident out of malice or as a prank. In support of such contentions, Plaintiffs have produced a report from an investigator who interviewed Mr. Price about two months after Mr. Crann's arrest. The report states:

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[2] The Court takes judicial notice of City of Seattle records indicating that in the 3900 block, Whitman Avenue North and Woodland Park Avenue North run parallel to each other and are one block apart.

> JOHN [Price] said that when the police finally showed up on the second occasion, he was on one of the street corners and he flagged down the police and pointed out the guy. JOHN said as soon as he pointed out the guy, the guy immediately turned and started walking the other direction. JOHN said that when the police officer saw this, he told the guy, "Don't go anywhere," several times, but the guy kept moving. When the police got close, the guy tried to run and the police got him on the ground. JOHN termed this sequence of events, "hilarious."

(Dkt. No. 103-2 at 3). Characterizing the arrest of another person as "hilarious" certainly may be in poor taste. However, this statement provides a very thin basis for the Court to find that Mr. Price had a motive to communicate false information to the police. Plaintiffs appear to suggest that Mr. Price made false statements to the police in order to amuse himself by causing the arrest of a person that he did not know. The Court finds little reason to reach this conclusion, particularly in light of the standard of proof for bad faith. Although Mr. Crann suggests that Mr. Price had been drinking the night of October 5th, at most this would tend to suggest that Mr. Price's judgment may have been impaired, not that he acted out of an "interested or sinister motive."[3]

In a footnote, Plaintiffs suggest that they should be permitted to take additional discovery to pursue evidence regarding bad faith. The Court disagrees. In its order on Defendant Price's motion for summary judgment, the Court indicated that Plaintiffs could renew their request for a Rule 56(f) continuance on "bad faith" issues if Defendant sought statutory damages under RCW 4.24.510. However, Plaintiffs have not provided a sufficient basis for such a continuance. As the Court noted in its order on Defendant Price's summary judgment motion, a party seeking a continuance under Rule 56(f) must specifically identify relevant information where there is a basis for believing that the information sought actually exists. See Dkt. No. 89 at 8. Here, Plaintiffs have not specifically identified what information they would seek through continued discovery. Plaintiffs previously made a vague assertion that additional discovery was needed on "[i]ssues relating to Price's intent and behavior." Id. at 9. Plaintiffs have not identified with greater specificity what type of information

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[3] There is no indication in the police report that Mr. Price appeared intoxicated on October 5th.

regarding Mr. Price's "intent and behavior" they wish to seek through continued discovery, nor have they offered a basis for believing that such information exists.[4]

In sum, the Court finds that Plaintiffs have not demonstrated by clear, cogent, and convincing evidence that Mr. Price engaged in bad faith when he communicated information to the police. Defendant will be awarded statutory damages in the amount of $10,000 pursuant to RCW 4.24.510.

This award leads to the question of whether liability for statutory damages under RCW 4.24.510 may or should be imposed on Plaintiffs' former counsel Paul Richmond, rather than on Plaintiffs.[5] RCW 4.24.510 does not indicate who shall be required to pay statutory damages, nor does there appear to be any Washington law that squarely addresses whether such damages may be imposed on the non-prevailing party's counsel. In the context of awarding attorneys' fees under RCW 4.84.185, Washington courts have suggested that an award of fees must assessed against the non-prevailing "party" and not against his or her attorney. See Watson v. Maier, 64 Wn. App. 889, 896 (1992). However, such a rule would be consistent with the express language of RCW 4.84.185, which authorizes such awards against "the nonprevailing party." Id. By contrast, RCW 4.24.510 includes no similar provision providing that statutory damages or fees must be assessed against the "non-prevailing party."

If the Washington State Legislature intended to provide that an award of statutory damages under RCW 4.24.510 could only be imposed on the non-prevailing "party," the Legislature could have adopted the same type of language included in RCW 4.84.185. Given the Legislature's silence in this

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[4] As the Court noted in its prior order, a Rule 56(f) continuance may also be denied due to lack of diligence in pursuing discovery throughout the course of the litigation, and Plaintiffs failed to demonstrate that they diligently pursued discovery in this matter. (Dkt. No. 89 at 9-10).

[5] In an unauthorized "supplemental declaration and memorandum" filed after this motion was fully briefed, Plaintiffs also argued that imposing statutory damages against them under RCW 4.24.510 would be unconstitutional. As the Court stated at oral argument, these new constitutional arguments will not be considered: (1) because they were not raised in a timely manner; and (2) Plaintiffs have not complied with the requirements of Fed. R. Civ. P. 24(c).

regard and the lack of Washington case law on this question, the Court must use its best judgment to predict how the Washington Supreme Court would rule on this issue. See Burlington Ins. Co. v. Oceanic Design & Constr., 383 F.3d 940, 944 (9th Cir. 2004). In making this determination, the Court may look to well-reasoned decisions of courts in other jurisdictions that have confronted analogous situations. Id.

Other jurisdictions have at times permitted an award of statutory fees to be imposed against the non-prevailing party's attorney, rather than against the party itself. See, e.g., Motown Prods., Inc. v. Cacomm, Inc., 849 F.2d 781, 786 (2d Cir. 1988) (authorizing courts to require the non-prevailing party's attorney to pay the prevailing party's fees under Section 35 of the Lanham Act); But see Pfingston v. Ronan Eng'g Co., 284 F.3d 999, 1006 (9th Cir. 2002) (statutory award of fees to prevailing parties in claims under federal False Claims Act or 42 U.S.C. § 1988 not authorized against attorneys). As the court in Motown noted, "it seems proper to permit the district court to impose the sanction, in whole or in part, against the attorney when it finds that the improper conduct was caused by the attorney rather than the client." Motown, 849 F.2d at 786.

The reasoning of the Motown court is sensible and persuasive. The Court finds it likely that the Washington Supreme Court would apply similar reasoning in this context and would provide that trial courts have discretion to determine whether to impose statutory damages under RCW 4.24.510 against the non-prevailing party, the non-prevailing party's attorney, or both, depending on the equities of the case.

In this case, the improper assertion of untenable state-law claims against Mr. Price was entirely due to the failure of Plaintiffs' former counsel Paul Richmond to provide competent representation to his clients. Plaintiffs Crann and Black plainly had no idea that RCW 4.24.510 provided Mr. Price with absolute immunity against civil liability for communicating information to the police, much less that Mr. Price could claim $10,000 in statutory damages if he prevailed on the defense provided by RCW 4.24.510. As a member of the Washington State Bar Association and the bar of this Court, Mr.

Richmond had a duty to provide competent representation to his clients, including "the legal knowledge, skill, thoroughness, and preparation reasonable necessary for the representation." See Wash. R. of Prof. Conduct 1.1. Mr. Richmond did not uphold this duty when he failed to recognize that Plaintiffs' state-law claims against Mr. Price were barred under Washington law. Under these circumstances, where it is clear that the "improper conduct was caused by the attorney rather than the client," the Court finds that Mr. Richmond alone should be liable for the damages that have resulted from his failure to represent his clients in a competent manner. Therefore, the Court holds that Plaintiffs' former counsel Paul Richmond shall be solely liable for payment of statutory damages of $10,000 to Defendant John Price pursuant to RCW 4.24.510.

2. Attorneys' Fees and Expenses Under RCW 4.24.510

RCW 4.24.510 provides that "[a] person prevailing upon the defense provided for in this section is entitled to recover expenses and reasonable attorneys' fees incurred in establishing the defense . . . ." Plaintiffs do not dispute that an award of fees and expenses is mandatory under this section. However, they argue that the amount of fees claimed by Mr. Price is unreasonable. The Court agrees.

In his opening brief, Mr. Price requested $22,532.57 in attorneys' fees and $416.23 in out-of-pocket expenses under RCW 4.24.510, as well $200 in statutory costs under RCW 4.84.020(6) and RCW 4.84.080. (Dkt. No. 96 at 7). Mr. Price's counsel made no attempt to segregate the fees and expenses that were incurred in this matter in establishing the defense provided by RCW 4.24.510 from fees and expenses incurred on other matters. Instead, Defendant's counsel asserts that "[s]egregation is not easy in this case due to the fact that seven separate causes of action were asserted against Price, only one of which was a federal claim." (Dkt. No. 96 at 4-5). Mr. Price proposes that the Court should simply allow him to recover 6/7ths of all the fees and expenses that his attorneys incurred in representing him in this matter as an award under RCW 4.24.510.

To calculate the reasonable attorneys' fees incurred in establishing the defense provided by RCW 4.24.510, the Court must first calculate the "lodestar" figure – "the number of hours reasonably expended (discounting hours spent on unsuccessful claims, duplicated effort, and otherwise unproductive time) multiplied by the attorney's reasonable hourly rate." Banuelos v. TSA Washington, Inc., __ Wn. App. __, 141 P.3d 652, 657 (2006). Here, the Court concludes that Mr. Price's fee request of $22,532.57 does not reflect the hours reasonably expended on establishing the defense provided by RCW 4.24.510, nor it is based on a reasonable hourly rate for the work performed.

A. Hours Reasonably Expended

RCW 4.24.510 states that a party prevailing on the defense provided by the statute shall be entitled to "reasonable attorneys' fees incurred in establishing the defense." The meaning of this provision is plain: Defendant Price is only entitled to reasonable fees that were incurred "in establishing the defense" provided by RCW 4.24.510. The statute does not allow fees for other matters outside this narrow category.

Defendant's counsel suggests that it is not easy to segregate the fees incurred in establishing the defense from the other fees incurred in this matter. The Court disagrees. As a preliminary matter, it appears that Defendant's counsel was aware of the immunity defense provided by RCW 4.24.510 very early in this case. See, e.g., Dkt. No. 96-2 at 2 (Defendant's counsel finalized memo on "affirmative defense of immunity from civil liability, as well as award of attorney's fees and expenses incurred" on November 22, 2005, only eight days after first billing entry in the matter). As a result, Defendant's counsel should have made efforts to ensure that fees and expenses incurred in establishing the defense were clearly documented and segregated from fees and expenses incurred on other matters. See Loeffelholz v. C.L.E.A.N., 119 Wn. App. 665, 690 (2004).

In any case, as Plaintiffs note, the billing records of Defendant's counsel provide fairly detailed descriptions of the work performed, making it relatively simple to segregate the fees incurred in

establishing the defense provided by RCW 4.24.510 from other fees incurred in this matter. Plaintiffs' counsel has suggested that the only fees that should be allowed under RCW 4.24.510 are for the 26.75 hours listed in Exhibit 11 to the Declaration of Plaintiffs' counsel ("Exhibit 11"). See Dkt. No. 99-6 at 6-7. The Court agrees with Plaintiffs' analysis. The billing entries set forth in Exhibit 11 essentially reflect time that Defendant's counsel spent researching immunity issues and drafting Defendant's successful motion for summary judgment, which resulted in dismissal of Plaintiffs' state law claims due to the immunity provided by RCW 4.24.510. These are the type of fees that were reasonably necessary to establish the defense provided by RCW 4.24.510.

It is clear that establishing the immunity defense was not difficult. As Plaintiffs' counsel suggests, Defendant Price could have established this defense and obtained dismissal of all six state-law claims by filing a short motion to dismiss under Rule 12(b)(6) at the outset of this case. In terms of legal analysis, Defendant only needed to provide the same four-paragraph legal argument that he offered when he ultimately moved for summary judgment on the state-law claims under RCW 4.24.510. See Dkt. No. 57 at 7-8. Instead of taking this straightforward step at the outset of this case, Defendant's counsel opted instead for a more circuitous route. For example, Defendant's counsel asserted an improper "counterclaim" for "immunity defense" and unnecessarily incurred fees by filing a motion to hold Plaintiffs in default for failing to answer this purported "counterclaim" – all inappropriate and unnecessary actions that the Court rejected. See Dkt. No. 56.

In his reply brief, Defendant appears to suggest that he was unable to file a 12(b)(6) motion to establish the immunity defense provided by RCW 4.24.510. Defendant bases this argument on the fact that when he filed a motion for default judgment on his inappropriate "immunity defense counterclaim," Plaintiffs sought to introduce a declaration from Elizabeth Frost. Defendant seems to suggest that if he had filed a motion to dismiss under 12(b)(6), Plaintiffs would have offered the same declaration and the Court would have been required to convert the motion into a motion for summary judgment under Rule 56.

Defendant's reasoning is not persuasive. If Defendant had moved to dismiss Plaintiffs' state-law claims under 12(b)(6) based on the immunity defense and Plaintiffs sought to offer materials outside the pleadings (e.g., Ms. Frost's declaration), the Court would not have been automatically required to convert the motion into a summary judgment motion. Instead, the Court could have simply excluded the declaration as extraneous. See Fed. R. Civ. P. 12(b)(6) (providing that court may exclude materials outside the pleadings in ruling on motion to dismiss); Keams v. Tempe Tech. Inst., Inc., 110 F.3d 44, 46 (9th Cir. 1997) (Rule 12(b)(6) motion not converted to summary judgment motion where court stated that it did not rely on exhibits outside the pleadings in reaching its legal conclusion). In this case, Ms. Frost's declaration would have been extraneous to the question of whether Defendant was entitled as a matter of law to civil immunity from Plaintiffs' state-law claims pursuant to the defense provided by RCW 4.24.510.[6]

Therefore, the Court finds that Defendant's counsel reasonably expended 26.75 hours in establishing the defense provided by RCW 4.24.510, as described in the billing entries set forth in Exhibit 11 to the declaration of Plaintiffs' counsel. This total reflect 22.65 hours of work performed by attorney Robert Bartlett and 4.1 hours of work performed by attorney Diana Hill. The Court will not allow any fees incurred by Defendant's counsel after June 15, 2006, the date that the Court granted summary judgment in favor of Defendant Price. At that time, the defense provided by RCW 4.24.510 was established. Any further fees incurred after that date (e.g., for briefing to establish the amount of fees incurred, entitlement to statutory damages, etc.) are not provided by the statute.

B. Reasonable Hourly Rate

The Court must next determine a reasonable hourly rate for the work performed by Defendant's counsel. "In determining the attorney's reasonable hourly rate, the trial court may

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[6] At most, the declaration might have had some relevance in determining whether Plaintiffs could avoid the $10,000 in statutory damages provided by RCW 4.24.510 on "bad faith" grounds, not on the availability of the immunity defense to Mr. Price.

consider the skill level the litigation requires, the time limitations the litigation imposes, the size of the potential recovery, the attorney's reputation, and the undesirability of the case." Banuelos, 141 P.3d at 657; see also Wash. R. Prof. Conduct 1.5 (listing factors to consider in determining reasonableness of attorneys' fees).

Defendant requests a rate of $245 per hour for Mr. Bartlett's work and $125 per hour for Ms. Hill's work.[7] In response, Plaintiffs argue that the Court should not allow the $245 per hour rate for Mr. Bartlett's work in light of the novelty and difficulty of the questions involved and the skill requisite to perform the legal service properly. As Plaintiffs note, Defendant's arguments regarding the applicability of the immunity defense provided by RCW 4.24.510 were not complex. Plaintiffs suggest that a reasonable hourly rate for Mr. Bartlett's work in establishing the defense provided by RCW 4.24.510 would be $150 an hour. Plaintiffs observe that $150 an hour is the same rate previously claimed in this litigation for the work of Tobin Dale, an experienced attorney who appeared in this matter for the City of Seattle and the police officers. See Dkt. No. 18 at 2.

The Court agrees with Plaintiffs. Although Mr. Bartlett is an experienced attorney and the Court does not doubt that he may warrant a higher hourly rate in a different matter, the level of skill required to establish the defense provided by RCW 4.24.510 simply was not great. In order to prevail on this defense, Defendant Price could have merely filed a motion to dismiss that cited the language of RCW 4.24.510, perhaps with a citation to this Court's previously published ruling in which the Court noted that the Legislature had eliminated the "good faith" requirement from RCW 4.24.510 in 2002. See Harris v. City of Seattle, 302 F. Supp. 2d 1200, 1202 n.1 (W.D. Wash. 2004). Given the lack of complexity of this legal question and the relatively low level of skill required to establish civil immunity in this case, the Court finds that an hourly rate of $245 an hour would not be reasonable. In addition, this case did not appear to impose significant time limitations, did not involve a particularly large

[7] Although two other attorneys performed work for Mr. Price, Mr. Bartlett and Ms. Hill are the only attorneys who performed the work listed in Exhibit 11.

potential recovery, and did not appear to present an "undesirable" case for Defendant's counsel to take – particularly in light of obvious defenses available to Mr. Price. As a result, the Court finds that a rate of $150 an hour would be appropriate for Mr. Bartlett's work in establishing the defense provided by RCW 4.24.510.

C. Total Fee Award

Consistent with the discussion above, the Court finds that Defendant Price's reasonable attorneys' fees incurred in establishing the defense provided by RCW 4.24.510 is $3,910. This figure reflects 22.65 hours for the work of Mr. Bartlett at a rate of $150 per hour and 4.1 hours for the work of Ms. Hill at $125 per hour.

D. Expenses

RCW 4.24.510 also provides that Mr. Price is entitled to recover expenses incurred in establishing his defense under this statute. Mr. Price claims $416.23 in out-of-pocket expenses under RCW 4.24.510. As Plaintiffs note, the billing records provided by Defendant's counsel generally do not identify which costs apply to which task, making it difficult for the Court to determine a fair award of costs. Under these circumstances, the Court agrees with Plaintiffs' suggestion that it would be reasonable "to compensate costs based on the percentage of the attorney's fees awarded as compared with fees sought." (Pls.' Opp. at 12). The Court is awarding Defendant Price $3,910 in attorneys' fees pursuant to RCW 4.24.510, which represents 17.35% of his original request for $22,532.57 in fees under the statute. Therefore, the Court will award Defendant Price 17.35% of the out-of-pocket costs of $416.23 that he originally sought under RCW 4.24.510, for a total of $72.22.

The Court denies Defendant's request for a "statutory attorney fee award of $200 as costs" pursuant to RCW 4.84.010(6) or RCW 4.84.080. (Dkt. No. 96 at 7). This Court has previously declined to award such costs in another case involving the immunity defense provided by RCW 4.24.510. See Harris v. City of Seattle, C02-2225P, Dkt. No. 141 at 4 (request for such costs by Defendant Washington Firm) and Dkt. No. 200 at 2 (denying request on grounds that "State statutory

attorney's fees are not taxable"). The Court also declines to award Defendant interest on his attorneys' fees. As Plaintiffs note, none of the statutes or rules relied upon by Defendant provide for such an award of interest.

E. Liability for Attorneys' Fees and Expenses Under RCW 4.24.510

RCW 4.24.510 does not indicate who shall bear liability for attorneys' fees and expenses awarded under the statute. For the same reasons that the Court discussed earlier in determining that Mr. Richmond should be liable for statutory damages under RCW 4.24.510, the Court finds that liability for the Mr. Price's fees and expenses under RCW 4.24.510 should be imposed solely on Plaintiffs' former counsel Paul Richmond. Therefore, Mr. Richmond shall be solely liable to Defendant Price for $3,910 in attorneys' fees and $72.22 in costs under RCW 4.24.510.

3. Attorneys' Fees Under 42 U.S.C. § 1988

Mr. Price also seeks an award of attorneys' fees under 42 U.S.C. § 1988 as the prevailing party on Plaintiffs' claims under 42 U.S.C. § 1983. In his opening brief, Mr. Price appears to assert that a prevailing defendant in a § 1983 case is automatically entitled to an award of attorneys' fees under § 1988. See Opening Brief at 8 (asserting that "[a] prevailing party in a § 1983 action is entitled to his reasonable attorneys fees and costs under 42 USC § 1988(b)").

As Plaintiffs note, Defendant's assertion is not accurate. Although a prevailing plaintiff in a § 1983 case is normally entitled to an award of attorneys' fees, a prevailing defendant typically is not. Under Ninth Circuit law, "[a] prevailing defendant is entitled to attorney fees under 42 U.S.C. § 1988 only when the plaintiff's claims are 'groundless, without foundation, frivolous, or unreasonable.'" Karem v. City of Burbank, 352 F.3d 1188, 1195 (9th Cir. 2003); see also Barry v. Fowler, 902 F.2d 770, 773 (9th Cir. 1990) ("[a]ttorneys' fees in civil rights cases should only be awarded to a defendant in exceptional circumstances."). "In determining whether this standard has been met, a district court must assess the claim at the time the complaint was filed, and must avoid '*post hoc* reasoning by

concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.'" Tutor-Saliba Corp. v. City of Hailey, 452 F.3d 1055, 1060 (9th Cir. 2006).

Here, the Court does not conclude that Plaintiffs' § 1983 claims against Mr. Price were groundless, without foundation, frivolous, or unreasonable at the time the complaint was filed. Although the Court ultimately dismissed the § 1983 claims against Mr. Price because there was no evidence that he was a "state actor," the question of whether a person may be regarded as a "state actor" under § 1983 is a difficult and often fact-intensive question. The inquiry does not begin and end with the fact that Mr. Price was a private citizen. As the Ninth Circuit has noted, "[a] private party can still become a state actor if it acts in concert with state officials, or if the state has lent 'significant encouragement' to its action, or if it is exercising powers traditionally the exclusive prerogative of the state." Smith v. Detroit Fed'n of Teachers, Local 231, 829 F.2d 1370, 1377 (9th Cir. 1987). The Ninth Circuit has noted that "we still find the concept of 'state action' somewhat nebulous." Id. (citing Jackson v. Metropolitan Edison Co., 419 U.S. 345, 349-50 (1974) ("While the principle that private action is immune from the restrictions of the Fourteenth Amendment is well established and easily stated, the question whether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.")).

Prior to filing a complaint and obtaining discovery, Plaintiffs had little if any ability to determine whether Mr. Price acted in concert with the police in a manner sufficient to establish liability as a state actor. Based on the conduct alleged in his complaint, Plaintiffs had at least some basis believe that discovery would show that Mr. Price had acted in concert with the police. In particular, the fact that Plaintiffs' pre-suit investigation failed to locate any records of Mr. Price's alleged interaction with the police several weeks before Mr. Crann's arrest would serve to heighten suspicions on this question. Although Plaintiffs' former counsel apparently failed to pursue this issue by propounding discovery on Mr. Price after filing the complaint, the question is not whether Plaintiffs ultimately established their claim – instead, it is whether there was a non-frivolous basis to maintain

the claim at the time the complaint was filed. Accordingly, Defendant Price's request for attorneys' fees under § 1988 will be denied.

4. Rule 11 Sanctions

Finally, Defendant Price has renewed his previous request for the imposition of Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. Mr. Richmond has opposed this request, arguing that the claims asserted in Plaintiffs' complaint were based on a non-frivolous argument for the modification or reversal of existing law or the establishment of new law.

For the same reasons discussed immediately above, the Court finds that Mr. Richmond did not violate Rule 11 by filing a complaint with Section 1983 claims against Mr. Price. Although these claims were unsuccessful and tenuous at best, they were not patently frivolous. However, the Court finds that Mr. Richmond did violate Rule 11 by asserting state-law claims against Mr. Price for which RCW 4.24.510 plainly and unambiguously provided Mr. Price with immunity from civil liability.

By signing Plaintiffs' complaint, Mr. Richmond certified that the claims asserted in the complaint were "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law." Fed. R. Civ. P. 11(b)(2). When Mr. Price filed for summary judgment against Plaintiffs based on the immunity provided by RCW 4.24.510, the opposition brief filed by Mr. Richmond did not offer any non-frivolous arguments as to why the statute would not provide immunity to Mr. Price. Indeed, Mr. Richmond offered only a two-paragraph response to Mr. Price's arguments regarding immunity under RCW 4.24.510. See Dkt. No. 73 at 10-11. Mr. Richmond's arguments appeared to confuse the immunity provided to Mr. Price by RCW 4.24.510 with the provisions of the statute that permit a Court to waive an award of $10,000 in statutory damages to a defendant if a communication is made in bad faith. Id.

In response to Defendant Price's Rule 11 motion, Mr. Richmond has now raised several new arguments as to why RCW 4.24.510 should not be interpreted to provide absolute immunity from civil liability to a person who communicates information to the police. Notably, Mr. Richmond has

presented these new arguments in his response to the renewed Rule 11 motion, rather than presenting them in opposition to Defendant's summary judgment motion when such arguments might have benefitted his former clients. This suggests that Mr. Richmond's new arguments were belatedly developed for the purpose of avoiding the imposition of sanctions.

In any case, the Court is not persuaded by the belated arguments offered by Mr. Richmond. The language of RCW 4.24.510, as amended in 2002, is clear: "A person who communicates a complaint or information to any branch or agency of federal, state, or local government . . . is immune from civil liability for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization." There is no exception to this immunity for "bad faith" communications. This point is underscored by the fact that prior to amendment in 2002, RCW 4.24.510 had explicitly provided that immunity from civil liability would only apply to "a person who in good faith communicates a complaint or information" to a government agency. See 1999 Wash. Sess. Laws Ch. 54, § 1. As one commentator explained shortly after the 2002 amendment, "the amended section 4.24.510 provides much greater protection . . . . Even communications made in bad faith will be immune, although the [defendant] will then lose his or her right to statutory damages." Michael Eric Johnston, A Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of "Strategic Lawsuits Against Public Participation", 38 Gonz. L. Rev. 263, 286 (2003).

As a result, the Court finds that Mr. Richmond violated Rule 11 by asserting claims against Mr. Price that were clearly barred by RCW 4.24.510. The Court finds that Mr. Richmond has not demonstrated that his assertion of these claims on behalf of Plaintiffs was warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Although Mr. Richmond's conduct violated Rule 11, an award of monetary sanctions or attorneys' fees against Mr. Richmond is not automatic. "A sanction imposed for violation of this rule

shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated." Fed. R. Civ. P. 11(c)(2). The Ninth Circuit has emphasized that "Rule 11 'provides for sanctions, not fee shifting. It is aimed at deterring, and, if necessary punishing improper conduct rather than merely compensating the prevailing party.'" United States ex rel. Leno v. Summit Constr. Co., 892 F.2d 788, 791 n.4 (9th Cir. 1989) (internal citation omitted). It should also be noted that the Advisory Committee notes to the 1993 amendments to Rule 11 indicate that a variety of factors may be proper considerations in determining what sanctions, if any, should be imposed for a Rule 11 violation, including the financial resources of the person to be sanctioned. See also Warren v. Guelker, 29 F.3d 1386, 1390 (9th Cir. 1994) ("a court can properly consider plaintiff's ability to pay monetary sanctions as one factor in assessing sanctions").

Mr. Richmond has represented that he earns less than $10,000 per year from his legal practice, which obviously suggests that he has limited financial resources. (Dkt. No. 105 at 12). In addition, the Court has already held Mr. Richmond solely liable for the payment of approximately $14,000 to Defendant Price for statutory damages and attorneys' fees and expenses under RCW 4.24.510. As a result, the Court finds that monetary sanctions under Rule 11 are not warranted to deter further improper conduct by Mr. Richmond. Requiring Mr. Richmond to pay statutory damages, fees, and expense to Mr. Price should be sufficient to accomplish that goal.

5. Request for Entry of Partial Final Judgment Under Rule 54(b)

Finally, Defendant Price's motion requests entry of a partial final judgment under Rule 54(b). This request is now moot because all claims against the other named Defendants have been dismissed. See Dkt. No. 113. The Court will direct the Clerk to entry a final judgment in this matter pursuant to Rule 58.

Conclusion

For the reasons stated above, the Court GRANTS in part and DENIES in part Defendant Price's motion. Specifically, the Court:

(1) GRANTS Defendant Price's request for an award of statutory damages of $10,000 pursuant to RCW 4.24.510. Plaintiffs' former counsel Paul Richmond will be liable for payment of this award.

(2) GRANTS in part and DENIES in part Mr. Price's request for attorneys' fees and expenses under RCW 4.24.510. The Court awards Mr. Price fees of $3,910 and expenses of $72.22 pursuant to RCW 4.24.510. Plaintiffs' former counsel Paul Richmond will be liable for payment of these fees and expenses.

(3) DENIES Mr. Price's request for attorneys' fees under 42 U.S.C. § 1988.

(4) GRANTS in part and DENIES in part Mr. Price's request for Rule 11 sanctions against Plaintiffs' former counsel Paul Richmond. Although Mr. Price is correct that Mr. Richmond violated Rule 11 by bringing plainly unsustainable state-law claims against Mr. Price based on his communications with the police, the Court declines to impose monetary sanctions under Rule 11 against Mr. Richmond. Monetary sanctions under Rule 11 are not warranted to deter future conduct, given that the Court is requiring Mr. Richmond to pay fees, expenses, and damages to Mr. Price under RCW 4.24.510.

(5) DENIES as moot Mr. Price's request for entry of a partial final judgment under Rule 54(b) and DIRECTS the clerk to enter a final judgment under Rule 58.

The clerk is directed to provide copies of this order to all counsel of record and to Plaintiffs' former counsel Paul Richmond.

Dated: October 26, 2006

s/Marsha J. Pechman
Marsha J. Pechman
United States District Judge